

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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UNITED STATES OF AMERICA,

Case No. 2:16-CR-155 JCM (CWH)

Plaintiff(s),

ORDER

v.

JOEL KENNETH AUSBIE, et al.,

Defendant(s).

Presently before the court is defendant Joseph Strickland's motion to review a magistrate judge's detention order (ECF No. 39). The government has filed a response. (ECF No. 49). Defendant has not filed a reply, and the time for doing so has passed.

I. Background

Defendant was charged by a grand jury on May 18, 2016. (ECF No. 34). The indictment charges defendant and alleged co-conspirators with one count of conspiracy to commit arson, a violation of 18 U.S.C. § 844(i) and (n). *Id.*

Defendant made an initial appearance on January 28, 2016, before Magistrate Judge Carl Hoffman.¹ (ECF No. 5). Magistrate Judge Hoffman ordered the defendant detained, and he was remanded to custody. *Id.* On that same date, Magistrate Judge Hoffman signed an order of detention for defendant. (ECF No. 8).

II. Legal Standard

Title 18 U.S.C. § 3145(b) provides that "[i]f a person is ordered detained by a magistrate . . . the [detained] person may file, with the court having original jurisdiction over the offense, a motion for revocation or amendment of the order."

¹ Defendant was arraigned and entered a plea of not guilty on May 25, 2016, before Magistrate Judge Peggy Leen. (ECF No. 48).

1 The standard of review is de novo. *See, e.g., United States v. Koenig*, 912 F.2d 1190, 1191–
 2 92 (9th Cir. 1990); *United States v. Leon*, 766 F.2d 77, 80 (2d. Cir. 1985). The court must review
 3 the evidence presented to the magistrate judge and make “its own independent determination
 4 whether the magistrate [judge’s] findings are correct, with no deference” to either the magistrate
 5 judge's factual findings or ultimate conclusion regarding the propriety of detention. *Koenig*, 912
 6 F.2d at 1192–93. The court may, but need not, hold an evidentiary hearing to make this
 7 determination. *See id.*

8 Pursuant to 18 U.S.C. § 3142(e), the court must detain a defendant if it finds that “no
 9 condition or combination of conditions will reasonably assure the appearance of the person as
 10 required and the safety of any other person and the community.” The statute provides a list of
 11 factors for the court to consider in determining whether detention is necessary: “(1) The nature and
 12 circumstances of the offense charged . . . ; (2) the weight of the evidence against the person; (3)
 13 the history and characteristics of the person . . . ; and (4) the nature and seriousness of the danger
 14 to any person or the community that would be posed by the person’s release.” 18 U.S.C. § 3142(g).

15 For detention, the government must show that the defendant poses a flight risk by a
 16 preponderance of the evidence. *United States v. Windsor*, 785 F.2d 755, 757 (9th Cir. 1986). The
 17 government must also show that the defendant poses a danger to the community by clear and
 18 convincing evidence. *See United States v. Gebro*, 948 F.2d 1118, 1121 (9th Cir. 1991).

19 **III. Discussion**

20 Magistrate Judge Hoffman found that “[t]here is a serious risk that the defendant will not
 21 appear” and that “[t]here is a serious risk that the defendant will endanger the safety of another
 22 person or the community.” (ECF No. 8 at 2). In so finding, Judge Hoffman stated:

23 Based on the information as set forth in the government's proffer, as well as the
 24 information provided to the Court by Pretrial Services, the Court finds the
 25 defendant poses a substantial risk of danger to the community and a substantial risk
 26 of nonappearance. The defendant's prior criminal history record reflects a prior
 27 felony conviction, seven prior misdemeanor convictions and several prior probation
 28 violations. The defendant also lacks significant family, property and employment
 ties to the community. The Court finds there are no conditions or combination of
 conditions that the Court could fashion at this time that would reasonably protect
 the community against the risk of danger posed by the defendant or assure the
 defendant's appearance at future court proceedings, accordingly, the defendant is
 ordered detained pending trial.

Id.

1 Judge Hoffman found by clear and convincing evidence based on the information offered
2 at the initial appearance hearing—specifically, the government’s proffer and pretrial services’s
3 assertions—that the defendant is a danger to the community. *Id.* He also found “by a
4 preponderance of the evidence that the defendant is a risk of flight and no condition or combination
5 of conditions will reasonably assure the safety of the community or the appearance of the
6 Defendant.” *Id.*

7 Strickland objects to the detention order. (ECF No. 39). Defendant’s counsel has spoken
8 to defendant’s aunt and asserts that the aunt “is willing to allow Strickland to reside at her home
9 and be a third party custodian.” *Id.* at 2. Defendant implies that this familial supervision would
10 address a concern of the government that “there were no verifiable addresses or phone numbers
11 for Strickland,” requesting that Strickland be released to his aunt with GPS monitoring. *Id.*
12 Additionally, defendant’s counsel asserts that pretrial services indicated to her that no probation
13 violations were on its report. *Id.* at 2–3. Finally, defendant asserts that bench warrants for traffic
14 tickets are a poor indication of whether he will appear in court when required to do so. *Id.* at 3.

15 The government’s response indicates that its concerns were not limited to verifiable
16 addresses or phone numbers, but also “employment, mental health, and substance abuse history.”
17 (ECF No. 49 at 3). Further, the government reiterates the defendant’s criminal history, which
18 includes a 2006 felony conviction, a misdemeanor assault conviction, and a conviction on
19 supervised release. *Id.*

20 The court now applies the factors outlined in 18 U.S.C. § 3142(g). First, Strickland has
21 been charged with conspiracy to commit arson with respect to the Las Vegas Kettle Corn & Special
22 Events, LLC property located in Henderson, Nevada. (ECF No. 34). The offense underlying the
23 alleged conspiracy, arson, is a serious crime. *See United States v. Hammond*, 742 F.3d 880, 884
24 (9th Cir. 2014) (“Even a fire in a remote area has the potential to spread to more populated areas,
25 threaten local property and residents, or endanger the firefighters called to battle the blaze.”).
26 Therefore, this consideration weighs against granting defendant’s motion.

27 Second, the weight of the evidence of guilt applies only to considering “the likelihood that
28 the person will fail to appear or will pose a danger to the community.” *United States v. Windsor*,
785 F.2d 755, 757 (9th Cir. 1986). While the record here does not clearly indicate the weight of
the evidence of guilt, this factor “is the least important of [the 18 U.S.C. § 3142(g)] factors.” *Id.*

1 Third, defendant's history and characteristics weigh against him. Assuming *arguendo* both
 2 that living with the aunt would provide a discernable mailing address and telephone number for
 3 defendant and that GPS would address some possibility that defendant might not appear, the
 4 government's legitimate concerns regarding the lack of verified information regarding defendant's
 5 mental health, substance abuse history, and employment remain unaddressed. (*See* ECF No. 49 at
 6 3). Additionally, the government states that information provided to pretrial services "indicated
 7 that [defendant] has a history of substance abuse, unstable residence, and unstable employment."
 8 *Id.* Further, the record indicates that defendant has a prior felony conviction and seven
 9 misdemeanor convictions. (ECF No. 8 at 2). Therefore, this consideration weighs against granting
 10 defendant's motion.

11 Finally, the court agrees with Magistrate Judge Hoffman's conclusion that "the defendant
 12 poses a substantial risk of danger to the community" (ECF No. 8 at 2). The serious nature
 13 of the alleged crime, the government's argument discussing the lack of verified information, and
 14 the defendant's criminal history is persuasive to find that defendant would pose a risk of danger to
 15 the community. The court finds that defendant's release to his aunt's custody with GPS tracking
 16 is not sufficient to alleviate well-founded concern regarding the appearance of this defendant or
 17 reasonably protect the community against the risk of danger posed by defendant.

18 **IV. Conclusion**

19 Based on a *de novo* review of Judge Hoffman's findings and conclusions, as well as the
 20 foregoing discussion, the court finds by a preponderance of the evidence that defendant is a risk
 21 of flight. Moreover, the court finds by clear and convincing evidence that defendant is a danger
 22 to the safety of the community and that no condition or combination of conditions will reasonably
 23 assure the safety of the community.

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1 Accordingly,

2 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that defendant Joseph
3 Strickland's motion to review a magistrate judge's detention order (ECF No. 39) be, and the same
4 hereby is, DENIED.

5 DATED August 12, 2016.

6 
UNITED STATES DISTRICT JUDGE